



## **DEPARTMENT OF LABOR**

### **Wage and Hour Division**

#### **29 CFR Parts 516, 531, 578, 579, and 580**

#### **RIN 1235-AA21**

### **Tip Regulations under the Fair Labor Standards Act (FLSA); Partial Withdrawal**

**AGENCY:** Wage and Hour Division, Department of Labor.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** In this notice of proposed rulemaking (NPRM), the Department proposes to withdraw and repropose two portions of the Tip Regulations Under the Fair Labor Standards Act (FLSA) (2020 Tip final rule) and seeks comment on whether to revise one other portion of the 2020 Tip final rule relating to the statutory amendments to the FLSA made by the Consolidated Appropriations Act of 2018 (CAA). The Department also asks questions about how it might improve the recordkeeping requirements in the 2020 Tip final rule in a future rulemaking. This rulemaking is related to a second NPRM, published elsewhere in this issue of the *Federal Register*, which proposes to further extend the effective date of three portions of the 2020 Tip final rule in order to complete this rulemaking involving two of those portions and provide the Department additional time to consider whether to withdraw and repropose a third portion of the 2020 Tip final rule concerning the use of the tip credit when employees perform both tipped and non-tipped work.

**DATES:** Portions of the final rule published on December 30, 2020 (85 FR 86756), and delayed February 26, 2021, at 86 FR 11632, are proposed to be withdrawn. Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** To facilitate the receipt and processing of written comments on this NPRM, the Department encourages interested persons to submit their comments electronically. You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA21, by either of the following methods: Electronic Comments: Follow the instructions for submitting comments on the Federal eRulemaking Portal <https://www.regulations.gov>. Mail: Address written submissions to Amy DeBisschop, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW, Washington, DC 20210. Instructions: This NPRM is available through the Federal Register and the <https://www.regulations.gov> website. You may also access this document via the Wage and Hour Division's (WHD) website at <https://www.dol.gov/whd/>. All comment submissions must include the agency name and Regulatory Information Number (RIN 1235-AA21) for this NPRM. Response to this NPRM is voluntary. The Department requests that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this NPRM. Submit only one copy of your comment by only one method (*e.g.*, persons submitting comments electronically are encouraged not to submit paper copies). Commenters submitting file attachments on [www.regulations.gov](http://www.regulations.gov) are advised that uploading text-recognized documents—*i.e.*, documents in a native file format or documents which have undergone optical character recognition (OCR)—enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration. Anyone who submits a comment (including duplicate comments) should understand and expect that the comment will become a matter of public record and will be posted without change to <https://www.regulations.gov>, including any personal information provided. WHD posts comments gathered and submitted by a third-party organization as a group under a single document ID number on

<https://www.regulations.gov>. All comments must be received by 11:59 p.m. on the date indicated for consideration in this NPRM; comments received after the comment period closes will not be considered. Commenters should transmit comments early to ensure timely receipt prior to the close of the comment period. Electronic submission via <https://www.regulations.gov> enables prompt receipt of comments submitted as the Department continues to experience delays in the receipt of mail in our area. For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at <https://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Amy DeBisschop, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693-0406 (this is not a toll-free number). Copies of this NPRM may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free (877) 889-5627 to obtain information or request materials in alternative formats.

Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website at <https://www.dol.gov/agencies/whd/contact/local-offices> for a nationwide listing of WHD district and area offices.

## **SUPPLEMENTARY INFORMATION:**

### **I. Executive Summary**

Section 3(m) of the FLSA allows an employer that satisfies certain requirements to count a limited amount of the tips received by its "tipped employees" as a credit

toward the employer’s Federal minimum wage obligation (known as a “tip credit”). *See* 29 U.S.C. 203(m)(2)(A). In 2018, Congress passed the CAA, Public Law 115-141, Div. S., Tit. XII, sec. 1201, 132 Stat. 348, 1148-49 (2018), which amended section 3(m). The CAA added a new statutory provision at section 3(m)(2)(B) which expressly prohibits employers from keeping employees’ tips “for any purposes” regardless of whether the employer claims a tip credit. This includes prohibiting “managers or supervisors” from keeping employees’ tips. The CAA also amended section 16(e)(2) of the FLSA to give the Department discretion to impose civil money penalties (CMPs) up to \$1,100 when employers unlawfully keep employees’ tips. On December 30, 2020, the Department issued a final rule that updates the Department’s tip regulations to implement the CAA amendments. The 2020 Tip final rule also makes other changes to the Department’s regulations, including revising the definition of “willful” in the Department’s CMP regulations.

In this NPRM, the Department proposes to withdraw and repropose two portions of the 2020 Tip final rule and seeks comment on whether to revise another portion of the 2020 Tip final rule to address the CAA. The Department proposes to withdraw and repropose: (1) the portion of the 2020 Tip final rule incorporating the CAA’s new provisions authorizing the assessment of CMPs for violations of section 3(m)(2)(B) of the Act; and (2) the portion of its CMP regulations addressing willful violations. In this NPRM, the Department also seeks comment on whether to revise the portion of the 2020 Tip final rule that addresses the statutory term “managers or supervisors.” Finally, the Department asks questions about how it might improve the recordkeeping requirements in the 2020 Tip final rule in a future rulemaking.<sup>1</sup>

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<sup>1</sup> Those portions of the 2020 Tip final rule defining “managers and supervisors” and creating a new recordkeeping requirement applicable to employers that do not take a tip credit but collect employees’ tips will go into effect on April 30, 2021.

This NPRM is related to a second NPRM, published elsewhere in this issue of the *Federal Register*, which proposes to further extend the effective date of three portions of the 2020 Tip final rule in order to complete rulemaking on two of the portions under this NPRM and to consider whether to withdraw and repropose a third portion of the 2020 Tip final rule not addressed in this NPRM, namely, the application of the FLSA’s tip credit provision to tipped employees who perform both tipped and non-tipped duties. The second NPRM requests comments on both the delay of the effective date and on the substance of the portions of the rule that are being delayed.

## **II. Background**

### *A. Tips and Tip Pooling*

Section 6(a) of the FLSA generally requires covered employers to pay employees at least the Federal minimum wage, which is currently \$7.25 per hour. 29 U.S.C. 206(a). Section 3(m)(2)(A) allows an employer to satisfy a portion of its minimum wage obligation to any “tipped employee” by taking a partial credit toward the minimum wage based on tips an employee receives. 29 U.S.C. 203(m)(2)(A). An employer may take a tip credit only if, among other requirements, the tipped employee retains all the tips he or she receives. *Id.* An employer taking a tip credit is, however, allowed to implement a mandatory “traditional” tip pool in which tips are shared only among employees who “customarily and regularly receive tips.” *Id.*

In 2011, the Department issued regulations interpreting what is now section 3(m)(2)(A) to prohibit employers—regardless of whether the employer takes a tip credit—from using employees’ tips other than as a credit against its minimum wage obligation to the employee, or in furtherance of valid traditional tip pools. *See* 76 FR 18832, 29 CFR 531.52 (2011); 29 CFR 531.54 (2011); 29 CFR 531.59 (2011). The Department stated that, although the statutory language did not expressly address the use of an employee’s tips when an employer does not take a tip credit and pays a direct cash

wage equal to or greater than the minimum wage, the regulations filled a gap in the statutory scheme. *See* 76 FR 18841–42.

Several lawsuits followed that addressed the Department’s authority to regulate employers that do not take a tip credit, as it did in the 2011 regulations. In 2016, the Ninth Circuit upheld the validity of the 2011 regulations in *Oregon Rest. & Lodging Ass’n (ORLA) v. Perez*, 816 F.3d 1080, 1090 (9th Cir. 2016). The next year, however, the Tenth Circuit issued a conflicting decision, ruling that the 2011 tip regulations were invalid to the extent they regulated employers that pay a direct cash wage of at least the Federal minimum wage and do not take a tip credit. *See Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1159 (10th Cir. 2017).

On December 5, 2017, the Department published an NPRM proposing to rescind the portions of its 2011 tip regulations that imposed restrictions on employers that pay a direct cash wage of at least the full Federal minimum wage and do not take a tip credit against their minimum wage obligations. *See* 82 FR 57395 (Dec. 5, 2017). The Department’s proposal would have allowed these employers to establish nontraditional tip pools that include employees who may contribute to the customers’ experience but do not customarily and regularly receive tips, such as dishwashers or cooks. *See, e.g.*, 82 FR 57399. A number of commenters on the 2017 NPRM supported allowing employers to establish nontraditional tip pools. Many commenters, however, expressed concern that under the Department’s proposal, an employer could keep an employee’s tips for the employer’s own use. *See, e.g.*, 84 FR 53959.

On March 23, 2018, Congress enacted the CAA, which amended section 3(m) of the FLSA to prohibit employers from keeping employees’ tips “for any purposes”—“regardless of whether or not the employer takes a tip credit.” *See* Pub. L. 115-141, Div. S., Tit. XII, sec. 1201; 29 U.S.C. 203(m)(2)(B). In adding section 3(m)(2)(B) to the FLSA, Congress gave the Department express statutory authority to prevent employers

from keeping employees' tips, even when the employer does not take a tip credit and pays the employee a cash wage equal to the full Federal minimum wage. Section 3(m)(2)(B) also prohibits employers from "allowing managers or supervisors to keep any portion of employees' tips." *Id.* The CAA also addressed the portions of the Department's 2011 regulations that restricted tip pooling when employers do not take a tip credit, by providing that those regulations "shall have no further force or effect until any future action taken by [the Department of Labor]." *See* CAA, Div. S, Tit. XII, sec. 1201(c).<sup>2</sup> However, the CAA left unchanged section 3(m)'s then-existing text, renumbered as section 3(m)(2)(A), thus preserving the longstanding statutory and regulatory requirements that apply to employers that take a tip credit.

The CAA also amended the penalty provisions in section 16 of the FLSA to incorporate the new statutory prohibition on employers keeping tips. Among other things, the CAA amended section 16(e)(2) to add a civil money penalty (CMP) for violations of section 3(m)(2)(B): "Any person who violates section 3(m)(2)(B) shall be subject to a civil penalty not to exceed \$1,100<sup>3</sup> for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages[.]"

Shortly after Congress passed the CAA, the Department issued a Field Assistance Bulletin (FAB) concerning the Wage and Hour Division's (WHD) enforcement of the amendments to section 3(m). *See* FAB No. 2018-3 (Apr. 6, 2018). The Department explained that the CAA had effectively suspended the regulatory restrictions on an

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<sup>2</sup> In light of the CAA amendments, the Department rescinded its 2017 NPRM on October 8, 2019. *See* 84 FR 53956.

<sup>3</sup> The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104-134, sec. 31001(s)) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114-74, sec. 701), requires that inflationary adjustments be made annually in these civil money penalties according to a specified formula.

employer’s ability to require tip pooling when it does not take a tip credit, and that “given these developments, employers who pay the full FLSA minimum wage are no longer prohibited from allowing employees who are not customarily and regularly tipped—such as cooks and dishwashers—to participate in tip pools.” *Id.* As a result, the Department explained, such employers may implement mandatory, “nontraditional” tip pools in which employees who do not customarily and regularly receive tips, such as cooks and dishwashers, may participate. The FAB also provides that, as “an enforcement policy, WHD will use the duties test at 29 CFR 541.100(a)(2)-(4) to determine whether an employee is a manager or supervisor,” and thus cannot “keep” another employee’s tips under section 3(m)(2)(B). *Id.* The FAB also states that the Department will follow its “normal procedures” for FLSA CMPs when enforcing the new tips CMP, and will assess tips CMPs only when it determines that a violation of section 3(m)(2)(B) is repeated or willful. *Id.*

*B. “Willful” Requirement for CMPs for FLSA Minimum Wage and Overtime Violations*

As discussed above, section 16(e)(2) of the FLSA provides for the assessment of CMPs for violations of the minimum wage (section 6), overtime pay (section 7), and, with the enactment of the CAA, tip provisions (section 3(m)(2)(B)) of the FLSA. Section 16(e)(2) authorizes the Department to assess CMPs for minimum wage and overtime pay violations only when the violations are “repeated or *willful*.” *See* 29 U.S.C. 216(e)(2) (emphasis added). The Department’s regulations at 29 CFR 578.3(c) and 579.2<sup>4</sup> define what violations are willful under the Act. These regulations are intended to implement the Supreme Court’s decision in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), that a willful violation occurs when the employer knew or showed reckless disregard for whether its conduct was prohibited by the FLSA. These regulations further provide that WHD shall take into account “[a]ll of the facts and circumstances

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<sup>4</sup> Section 579.2 defines what violations of the FLSA’s child labor provisions are willful.



surrounding the violation” when determining whether a violation is willful. 29 CFR 578.3(c)(1), 579.2. And these regulations identify two specific circumstances—prior advice from WHD to the employer that the conduct was unlawful and the employer’s failure to adequately inquire further into the lawfulness of its conduct when it should have—in which a violation “shall be deemed” willful. 29 CFR 578.3(c)(2) & (3), 579.2.

In *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 680-81 (1st Cir. 1998), the U.S. Court of Appeals for the First Circuit identified an “incongruity” between, on the one hand, the regulatory provisions deeming two specific circumstances to be willful, and on the other hand, “the *Richland Shoe* standard on which the regulation is based” and taking into account all of the facts and circumstances. The court urged the Department “to reconsider” § 578.3(c)(2) and (3) “to ensure that they comport with” *Richland Shoe*. *Id.* at 681 n.16. In 2016, the U.S. Court of Appeals for the D.C. Circuit addressed these regulations and noted that the Department had not altered them despite being urged to do so by the court in *Baystate*. See *Rhea Lana, Inc. v. Dep’t of Labor*, 824 F.3d 1023, 1030–32 (D.C. Cir. 2016).

### *C. 2020 Tip Final Rule*

On December 30, 2020, after considering comments on an NPRM for the 2020 Tip final rule (84 FR 67681), the Department issued a final rule revising the Department’s tip regulations to incorporate the CAA amendments. See 85 FR 86756. Because the Department was revising its CMP regulations to incorporate the new tips CMP for section 3(m)(2)(B) violations, the 2020 Tip final rule also addresses the “willful” portions of the Department’s CMP regulations in light of the court of appeals decisions in *Baystate* and *Rhea Lana*. The 2020 Tip final rule was scheduled to go into effect on March 1, 2021, but on February 26, 2021, the Department delayed the 2020 Tip final rule’s effective date to April 30, 2021, in order to give the Department additional time to consider issues of law, policy, and fact that warranted additional review.

i. Changes related to the CAA amendments to section 3(m)(2)(B) and related recordkeeping requirements.

The 2020 Tip final rule amends the Department's tip pooling regulations at 29 CFR 531.52, 531.54, and 531.59 to implement newly added section 3(m)(2)(B), an expansive provision which prohibits employers—regardless of whether they take a tip credit—from keeping employees' tips for any purposes, including allowing managers and supervisors to keep the tips. The 2020 Tip final rule explains that section 3(m)(2)(B) proscribes all manner of keeping tips, and is so broad as to prohibit an employer from exerting control over employees' tips other than to (1) distribute tips to the employee who received them, (2) require employees to share tips with other eligible employees, or, (3) where the employer facilitates tip pooling by collecting and redistributing employees' tips, to distribute tips to employees in a tip pool. The 2020 Tip final rule further provides that any employer that collects tips to facilitate a mandatory tip pool must fully redistribute the tips, no less often than when it pays wages, to avoid "keep[ing]" the tips in violation of section 3(m)(2)(B).

Further, while the Department observed in the 2020 Tip final rule that it was unlikely to occur, and difficult to enforce, an instance where an employer keeps tips by reducing the wages of workers who receive them can also be a violation of section 3(m)(2)(B) and the broad scope of the prohibition against keeping tips. *See* 85 FR 86766, 86777. To the extent that the 2020 Tip final rule can be read to suggest that an employer can never violate 3(m)(2)(B) by using one employee's tips to offset the wages of another employee, the Department does not agree. For example, if an employer hires a non-tipped employee at \$12 an hour, institutes a nontraditional tip pool in which that employee will receive \$2 an hour from the pool, and then informs the non-tipped employee that it will pay her only \$10 per hour on account of the tips she is now receiving from the tipped employees, this evidence that the employer is reducing the employee's wages and

supplementing them with another employee's tips can demonstrate an unlawful

"keeping" under section 3(m)(2)(B).<sup>5</sup>

The 2020 Tip final rule also addresses who is a manager or supervisor, and therefore may not keep employees' tips under section 3(m)(2)(B). The rule defines a "manager or supervisor," as an individual who meets the duties test at § 541.100(a)(2)-(4) or § 541.101. The rule specifies, however, that such a manager or supervisor may keep tips that he or she receives directly from customers based on the service that he or she directly provides.

Consistent with the CAA amendments, the 2020 Tip final rule also removes the portions of the Department's 2011 regulations that imposed restrictions on employers that do not take a tip credit. In addition, the 2020 Tip final rule amends 29 CFR 531.54 to explicitly state that an employer that pays tipped employees the full minimum wage and does not take a tip credit may impose a mandatory tip pooling arrangement that includes dishwashers, cooks, or other employees who are not employed in an occupation in which employees customarily and regularly receive tips, as long as that arrangement does not include any employer, supervisor, or manager. The 2020 Tip final rule also incorporates a new recordkeeping requirement for employers that administer nontraditional tip pools. These portions of the 2020 Tip final rule—addressing the CAA's changes to tips and tip pooling in section 3(m) and related recordkeeping requirements—will go into effect on April 30, 2021.

#### ii. Changes to CMP regulations

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<sup>5</sup> The 2020 Tip final rule discusses whether it would be a violation of section 3(m)(2)(B) if employers reduced the wages of back-of-house employees in response to including them in a nontraditional tip pool, and acknowledged that it would be "difficult" to "distinguish between lawful reductions to compensation and unlawful 'keeping' of 'tips received by its employees.'" The 2020 Tip final rule did not say whether such a practice would violate section 3(m)(2)(B). 85 FR 86766. This discussion originated from an acknowledgement in the economic impact analysis of possible employer responses to the rule, and was not intended to serve as an endorsement of the practice.

The 2020 Tip final rule also makes changes to the Department’s CMP regulations at 29 CFR parts 578, 579, and 580. In a separate NPRM published elsewhere in this issue of the *Federal Register*, the Department has proposed to delay the effective date of these portions of the 2020 Tip final rule until December 30, 2021, to allow the Department to complete this rulemaking before those discrete portions of the 2020 Tip final rule go into effect. The 2020 Tip final rule updates the Department’s FLSA CMP regulations to add references to the new CMP for violations of 3(m)(2)(B). The 2020 Tip final rule also specifies that the Department may assess CMPs only for “repeated or willful” violations of section 3(m)(2)(B), although the statute does not include this limitation. The 2020 Tip final rule also amends the Department’s CMP regulations on willful violations (specifically, 29 CFR 578.3(c)(2) & (3) and 579.2) to address the appellate court decisions that have, for example, “urge[d]” the Department to reconsider those regulations to ensure their consistency with the Supreme Court’s interpretation of the meaning of “willful” in the FLSA.<sup>6</sup>

### **III. Need for Rulemaking**

On February 26, 2021 the Department delayed the effective date of the 2020 Tip final rule to provide the Department additional opportunity to review and consider the questions of law, policy, and fact raised by the rule, as contemplated by the Regulatory Freeze Memorandum and OMB Memorandum M-21-14. 86 FR 11632. Among other issues, the Department sought to consider whether the 2020 Tip final rule properly

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<sup>6</sup> Unrelated to the CAA amendments, the 2020 Tip final rule also amends the Department’s regulations to reflect agency guidance explaining that an employer may take a tip credit for time that an employee in a tipped occupation spends performing related, non-tipped duties contemporaneously with tipped duties, or for a reasonable time immediately before or after performing the tipped duties. The 2020 Tip final rule also addresses which non-tipped duties are related to a tip-producing occupation. The Department has also proposed to delay the effective date of this portion of the 2020 Tip final rule, in addition to those parts of the final rule addressing CMPs, until December 31, 2020. The Department has requested comments on these issues in a second NPRM published in this issue of the *Federal Register* and does not address these issues here.

implements the CAA Amendments to section 3(m) of the FLSA, which prohibit employers from keeping tips for any purpose and whether the final rule otherwise effectuates the CAA amendments to the FLSA, including the statutory provision for CMPs for violations of section 3(m)(2)(B) of the Act. Additionally, on January 19, 2021, Attorneys General from eight states and the District of Columbia filed a complaint for declaratory and injunctive relief in the United States District Court for the Eastern District of Pennsylvania, in which they argued that the Department violated the Administrative Procedure Act in promulgating the 2020 Tip final rule.<sup>7</sup> The complaint argues that the 2020 Tip final rule makes several changes to the Department's regulations that are contrary to the FLSA and the CAA, including the 2020 Tip final rule's revisions to portions of its CMP regulations on willful violations, and the rule's imposition of a willfulness requirement for CMPs for section 3(m)(2)(B) violations. The complaint also asserts that the 2020 Tip final rule's provisions on managers and supervisors improperly prevent certain lower-paid managers and supervisors who perform tipped work from receiving tips. Delaying the effective date of the 2020 Tip final rule gave the Department the opportunity to review and consider the rule in light of the issues raised by that complaint.

Several commenters responded to the Department's February 5, 2021 proposal to delay the effective date of the 2020 Tip final rule and requesting comments on the merits of the rule, urging the Department to reconsider the 2020 Tip final rule's revisions to portions of its CMP regulations on willful violations and incorporation of the CAA's language regarding CMPs for section 3(m)(2)(B) violations into the Department's

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<sup>7</sup> *Commonwealth of Pennsylvania et al. v. Scalia et al.*, No. 2:21-cv-00258 (E.D. Pa., Jan. 19, 2021).

regulations. *See* 86 FR 11632.<sup>8</sup> These commenters also stated that the Department should consider the issues of law raised in the *Pennsylvania v. Scalia* complaint.

In light of the comments and upon review and reconsideration of the questions of law, policy, and fact raised by the 2020 Tip final rule, the Department now believes that it is appropriate to revisit a few portions of the final rule. Specifically, the Department is concerned that the 2020 Tip final rule inappropriately circumscribed the Department's discretion to assess CMPs for violations of 3(m)(2)(B), by restricting those CMPs to only "repeated" or "willful" violations, notwithstanding that the statute does not limit CMPs related to tips in such a way. Instead, the CAA gives the Department authority to assess such CMPs "as the Secretary determines appropriate." In addition, the Department believes that further modifications to the 2020 Tip final rule's revisions to its CMP regulations on willful violations may be necessary to align these regulations with Supreme Court and appellate court decisions; in particular, the Department believes that it may be necessary to restore guidance regarding when an employer's violation may show reckless disregard of the Act's requirements. The Department is therefore proposing to withdraw and repropose the two CMP portions of the 2020 Tip final rule and, in a second NPRM, has proposed to further delay the effective date of these portions of the 2020 Tip final rule to allow for this rulemaking.

The Department is also considering whether to revise language in the 2020 Tip final rule regarding "managers or supervisors" whom section 3(m)(2)(B) prohibits from keeping employees' tips. The Department is considering whether the 2020 Tip final rule's language regarding managers or supervisors could be revised to better address the fact that some managers and supervisors perform a substantial amount of tipped work. The Department is also considering whether this language could be revised to provide

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<sup>8</sup> Two commenters opposed delaying the effective date of the 2020 Tip final rule. 86 FR 11632.

additional flexibility for employers to allow managers and supervisors who meet the duties test in 29 CFR 541.100(a)(2)-(4) or 29 CFR 541.101 and perform tipped work to contribute to employer-mandated tip pools, but not receive other employees' tips from such tip pools.

#### **IV. Proposed Regulatory Revisions**

##### *A. Civil Money Penalties for Violations of section 3(m)(2)(B)*

Section 16(e) of the FLSA, 29 U.S.C. 216(e), establishes CMPs for certain violations of the Act. The CAA amended FLSA section 16(e)(2) to add new penalty language for employers who violate section 3(m)(2)(B) by “keep[ing]” employees’ tips. The new CMP provision states that: “Any person who violates section 3(m)(2)(B) shall be subject to a civil penalty not to exceed \$1,100<sup>9</sup> for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept . . .” Unlike the statutory provisions in section 16(e)(2) regarding CMPs for minimum wage and overtime violations, the statute does not limit the assessment of CMPs to repeated or willful violations of section 3(m)(2)(B). Instead, the new penalty language subjects persons who violate 3(m)(2)(B) to civil penalties “as the Secretary determines appropriate.”

Shortly after the passage of the CAA, the Department issued FAB No. 2018-3 (Apr. 6, 2018), explaining that the Department would “follow its normal procedures,” in enforcing the new CMPs “including by determining whether the violation is repeated or willful.” The Department’s 2020 Tip final rule adopted this guidance. The 2020 Tip final rule incorporates CMPs into the Department’s existing CMP regulations at 29 CFR

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<sup>9</sup> The CMP amount in the final rule was adjusted to \$1,162 for inflation, as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, sec. 31001(s)) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74, sec. 701).

parts 578, 579, and 580; applies the same considerations for determining the amount of a CMP for a violation of 3(m)(2)(B) as the Department uses for determining the amount of CMPs for minimum wage and overtime violations; and adopts for CMPs for violations of 3(m)(2)(B) the same longstanding rules and procedures already in place for CMPs for other FLSA violations. In addition, the 2020 Tip final rule would codify in regulation the Department's current enforcement policy of assessing CMPs for section 3(m)(2)(B) violations only after determining that a violation is repeated or willful. The Department explained in the 2020 Tip final rule that applying the same rules and procedures for CMPs for violations of 3(m)(2)(B) as the Department applies for CMPs for other FLSA violations created consistent enforcement procedures. *See* 85 FR 86773.

In response to the Department's proposal to extend the effective date of the 2020 Tip final rule, several commenters asked the Department to revisit language in the rule limiting the Department's ability to assess CMPs for section 3(m)(2)(B) violations to only repeat or willful violations. These commenters asserted that, because section 16(e)(2) specifically limits minimum wage and overtime CMPs to repeated and willful violations, but does not specifically limit the assessment of tip CMPs, the statute evinces Congress' intent that the assessment of tip CMPs is not predicated on a repeated or willful violation. *See, e.g.,* National Employment Law Project (NELP); National Women's Law Center; *see also* State Attorney Generals.

Although the 2020 Tip final rule acknowledged the Department's discretion to assess CMPs for violations of section 3(m)(2)(B), the 2020 Tip final rule circumscribed this discretion by limiting CMPs for violations of section 3(m)(2)(B) to only repeated or willful violations. Upon reevaluating this issue in light of the statutory language, however, the Department is concerned that it is inappropriate to circumscribe its discretion through regulation. Accordingly, the Department proposes to withdraw the CMP language for violations of 3(m)(2)(B) from the 2020 Tip final rule and adopt



regulatory language in 29 CFR 578.3(a)-(b), 578.4, 579.1, 580.2, 580.3, and 580.12, and 580.18(b)(3) so that the Department is not limited in its assessment of CMPs to only repeated and willful violations of section 3(m)(2)(B). This approach would preserve the Department's full discretion to assess CMPs for violations of 3(m)(2)(B), consistent with the statutory language which gives the Department authority to assess such CMPs "as the Secretary determines appropriate."

The Department is reproposing language in §§ 578.4, 579.1, 580.2, 580.3, and 580.12 that would, similarly to the language in the 2020 Tip final rule, adopt the same rules, procedures, and amount considerations for tip CMPs, as the Department applies for other FLSA CMPs.<sup>10</sup> The Department believes that adopting these same rules, procedures, and considerations will promote the goals of consistency and familiarity that the Department emphasized in the 2020 Tip final rule.

*B. Civil Money Penalties for Willful Violations of the Fair Labor Standards Act*

The Department proposes to revise portions of the Department's CMP regulations regarding when a violation of section 6 (minimum wage) or section 7 (overtime) of the FLSA is "willful," and thus subject to a CMP under section 16(e). Regarding how it determines whether an FLSA violation is willful for purposes of assessing CMPs, the Department proposes to withdraw and repropose with a modification the language at 29 CFR 578.3(c)(2) and 29 CFR 579.2 addressing when an employer's violation is knowing, and further proposes to reinsert language at 29 CFR 578.3(c)(3) and 29 CFR 579.2 to address the meaning of reckless disregard. These proposals will address appellate court

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<sup>10</sup> The Department is also proposing to revise § 580.18(b)(3) to eliminate the reference in that regulation to willful violations of section 3(m)(2)(B), which was a technical error since the CAA Amendments did not provide for criminal penalties for violations of section 3(m)(2)(B). Therefore, the Department is proposing to withdraw the change in the regulation made by the 2020 Tip final rule and revert back to the prior language of § 580.18.

decisions regarding these regulations and provide guidance on circumstances where employers' conduct may constitute reckless disregard.

Sections 578.3(c) and 579.2 address what violations are willful under the Act. As previously explained,<sup>11</sup> the Department's definition of a "willful" violation in §§ 578.3(c) and 579.2 is based on *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), which held that a violation is willful if the employer "knew or showed reckless disregard" for whether its conduct was prohibited by the FLSA. Sections 578.3(c)(1) and 579.2 incorporate this holding and state that "[a]ll of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful." The 2020 Tip final rule makes no changes to this language,<sup>12</sup> and the Department proposes none here.

For many years, the Department's CMP regulations in §§ 578.3(c)(2) and 579.2 provided that "an employer's conduct shall be deemed knowing, among other situations, if the employer received advice from a responsible official of [WHD] to the effect that the conduct in question is not lawful." Sections 578.3(c)(3) and 579.2 stated that "an employer's conduct shall be deemed to be in reckless disregard of the requirements of the Act, among other situations, if the employer should have inquired further into whether its conduct was in compliance with the Act, and failed to make adequate further inquiry." In the NPRM for the 2020 Tip final rule, the Department discussed concerns with this "shall be deemed" language that two appellate courts had identified. *See* 84 FR 53964–65 (discussing *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1030–32 (D.C. Cir. 2016), and *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 680–81 (1st Cir. 1998)). Those courts noted the inconsistency between the regulation's language, on the one hand, that conduct "shall be deemed knowing" if the employer was previously advised by WHD

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<sup>11</sup> *See* 85 FR 86773; 84 FR 53964.

<sup>12</sup> *See* 85 FR 86773.

that the conduct was unlawful, and its language, on the other hand, derived from *Richland Shoe*, that WHD shall take into account “[a]ll of the facts and circumstances surrounding the violation” when determining willfulness. *See id.* The Department explained in the NPRM for the 2020 Tip final rule that it does evaluate all of the facts and circumstances surrounding a violation when litigating willfulness and that, although an employer’s receipt of advice from WHD that its conduct was unlawful can be sufficient to prove willfulness, it would not necessarily be so (notwithstanding the regulatory language that appears to be to the contrary). *See* 84 FR 53965. In light of the appellate courts’ opinions and the Department’s acknowledgement of how it litigates willfulness, the NPRM for the 2020 Tip final rule proposed to revise §§ 578.3(c)(2)–(3) and 579.2 to clarify that, in considering all of the facts and circumstances, an employer’s receipt of advice from WHD that its conduct is unlawful and its failure to inquire further regarding the legality of its conduct are each “a relevant fact and circumstance” in determining willfulness. *See* 84 FR 53978.

After considering comments received, the 2020 Tip final rule revises § 578.3(c)(2) and the corresponding language in § 579.2 to state that, in considering all of the facts and circumstances, an employer’s receipt of advice from WHD that its conduct was unlawful “can be sufficient” to show that the violation is willful but is “not automatically dispositive.” *See* 85 FR 86774. The 2020 Tip final rule explains that this revision addressed concerns raised by commenters that one fact should not automatically result in a violation being willful but that an employer’s receipt of advice from WHD that its conduct was unlawful can be sufficient for a violation to be willful. *See id.* The 2020 Tip final rule further explains that an employer’s receipt of advice from WHD that its conduct is unlawful is a relevant, and may be a determining, factor regarding that employer’s willfulness, but the law also requires examining all facts and circumstances surrounding the violation. *See id.*

In addition, the 2020 Tip final rule deletes § 578.3(c)(3) and the corresponding language in § 579.2 addressing the meaning of reckless disregard. The 2020 Tip final rule explains that, unlike § 578.3(c)(2), § 578.3(c)(3) does not just identify a fact and address how that fact impacts a willfulness finding; instead, it addresses a scenario – should have inquired further but did not do so adequately – that is tantamount to reckless disregard. *See* 85 FR 86774 (citing *Davila v. Menendez*, 717 F.3d 1179, 1185 (11th Cir. 2013)). According to the 2020 Tip final rule, revising § 578.3(c)(3) in the same manner as § 578.3(c)(2) “did not seem helpful,” and retaining § 578.3(c)(3) without modifying it would not resolve the concerns raised by the appellate decisions discussed above. *Id.* It further explained that, “[a]mong other situations, proof that an employer should have inquired further into whether its conduct was in compliance with the Act and failed to make adequate further inquiry is only one indicium of reckless disregard.” *Id.*

Having considered the issues further, the Department continues to believe that revisions to § 578.3(c)(2) and the corresponding language in § 579.2 are warranted for all of the reasons described above and in the 2020 Tip final rule, but that a modification is needed in order to clarify that multiple circumstances, not just the circumstance identified, can be sufficient to show that a violation was knowing and thus willful. Accordingly, the Department proposes here to withdraw and repropose § 578.3(c)(2) and the corresponding language in § 579.2 to state that “the employer’s receipt of advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful, among other situations, can be sufficient to show that the employer’s conduct is knowing, but is not automatically dispositive.” These revisions would resolve the tensions identified within § 578.3(c) and between § 578.3(c)(2) and *Richland Shoe* and would comport more closely with how the Department litigates willfulness. The Department proposes to add “among other situations” to these sections, restoring language that was in § 578.3(c)(2) and the corresponding language in § 579.2

prior to the 2020 tip final rule, to make it clear, consistent with considering all of the facts and circumstances, that evidence other than the employer's receipt of advice from WHD that its conduct was unlawful can be sufficient to show that the violation was knowing and thus willful.

The Department additionally proposes to reinsert § 578.3(c)(3) and corresponding language in § 579.2 addressing the meaning of reckless disregard. Those proposed provisions state that “reckless disregard of the requirements of the Act means, among other situations, that the employer should have inquired further into whether its conduct was in compliance with the Act and failed to make adequate further inquiry.” Upon further consideration, the Department believes that it necessary to provide an explanation of what “reckless disregard” means rather than deleting § 578.3(c)(3) and the corresponding language in § 579.2 altogether. Deleting those provisions could suggest that an employer's failure to make adequate further inquiry into the lawfulness of its conduct when it should have may not constitute reckless disregard. The 2020 Tip final rule stated that the scenario where the employer should have inquired further but did not do so adequately “is tantamount to reckless disregard,”<sup>13</sup> but actually deleting § 578.3(c)(3) and the corresponding language in § 579.2 could suggest otherwise. Moreover, by explaining what “reckless disregard” means and also removing the “shall be deemed” language, the provisions proposed here would resolve the tensions identified within § 578.3(c) and between § 578.3(c)(3) and *Richland Shoe* and would, consistent with considering all of the facts and circumstances, not foreclose consideration of relevant evidence. Finally, including the “among other situations” language would indicate that reckless disregard could be proven by showing something other than the employer should have inquired further but did not do so adequately, as § 578.3(c)(3) and the corresponding language in § 579.2 provided prior to the 2020 Tip final rule.

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<sup>13</sup> *Id.* (citing *Davila*, 717 F.3d at 1185).

The Department welcomes comments on all aspects of this proposal regarding § 578.3(c)(2) and (3) and the corresponding language in § 579.2.

*C. Managers and Supervisors*

The 2020 Tip final rule makes several changes to the Department’s regulations to address the statutory term “managers and supervisors.” These changes will go into effect on April 30, 2021.<sup>14</sup> Section 531.52(b)(2) of the 2020 Tip final rule reiterates the prohibition in section 3(m)(2)(B) that “[a]n employer may not allow managers and supervisors to keep any portion of an employee’s tips, regardless of whether the employer takes a tip credit.” Consistent with the FAB issued shortly after the passage of the CAA and the Department’s NPRM for the 2020 Tip final rule, § 531.52(b)(2) of the 2020 Tip final rule defines managers and supervisors to mean “any employee whose duties match those of an executive employee as described in § 541.100(a)(2) through (4) or § 541.101 of this chapter.” See FAB No. 2018-3; 84 FR 53956 (Oct. 8, 2019); 85 FR 86789 (Dec. 30, 2020). Section 531.54(c)(3) and (d) of the 2020 Tip final rule prohibit employers from including such managers and supervisors in mandatory tip pools. The Preamble accompanying the 2020 Tip final rule interprets § 531.54(c)(3) and (d) to preclude managers and supervisors from contributing, as well as receiving, tips from mandatory tip pooling or sharing arrangements. 85 FR 86764.

In the 2020 rulemaking, the Department received comments from parties representing both employers and workers expressing concern that prohibiting managers or supervisors from receiving tips from mandatory tip pools could prevent lower-paid managers or supervisors who perform a substantial amount of service work from keeping

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<sup>14</sup> These sections were scheduled to go into effect on March 1, 2021, but on February 26, 2021, the Department delayed the 2020 Tip final rule’s effective date to April 30, 2021, in order to give the Department additional time to consider issues of law, policy, and fact that warranted additional review, consistent with the January 20, 2021 memorandum from the Assistant to the President and Chief of Staff, titled “Regulatory Freeze Pending Review.” See 86 FR 7424.

tips. The *Pennsylvania v. Scalia* complaint also expressed this concern, noting that the 2020 Tip final rule’s prohibition against managers or supervisors who meet the executive employee duties test from participating in mandatory tip pools is “overbroad” and “will exclude certain low wage workers from access to tip pools.”<sup>15</sup> In response to concerns from commenters about managers and supervisors who also perform tipped work, the Department added this language to § 531.52(b)(2) in the 2020 Tip final rule: “A manager or supervisor may keep tips that he or she receives directly from customers based on the service that he or she directly provides.” The Department is interested in whether it should make adjustments to this language to better address managers or supervisors who also engage in a substantial amount of tipped work. Although the Department is not proposing specific changes to the regulatory text at this time, the Department invites comment on possible modifications to the language in § 531.52(b)(2) clarifying that managers may keep tips that they receive directly from customers for the service that they directly provide. Specifically, the Department requests comments on the following:

1. How common is it for managers or supervisors who satisfy the duties test to perform tipped work? Please describe when and how this occurs, including how regularly and frequently this occurs. Does the extent to which managers or supervisors perform tipped work vary based on different industries or different types of establishments within an industry? If, in a given establishment, some managers or supervisors perform tipped work and others do not, please describe this arrangement.
2. Prior to the CAA amendments, how common was it for tipped managers or supervisors who satisfy the duties test to participate in tip pools or tip sharing arrangements? Please describe when and how this occurred.

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<sup>15</sup> *Commonwealth of Pennsylvania et al. v. Scalia et al.*, No. 2:21-cv-00258 (E.D. Pa., Jan. 19, 2021).

3. Is the language in § 531.52(b)(2) that permits managers and supervisors to keep tips they receive “directly from customers” based on the service that they “directly provide[]” sufficient to allow tipped managers and supervisors to collect all the tips they have earned from their customer service work?
4. How common is it for tips provided to a manager or supervisor to be commingled with tips provided to other tipped employees? Please describe when and how this would occur. Does this vary based on different industries or different types of establishments within in an industry?
5. Should the Department revise the language in § 531.52(b)(2) to clarify that a manager or supervisor may keep their own tips in a scenario in which tips provided to a manager or supervisor are comingled with tips provided to other tipped employees? How would such a regulation accurately identify the manager or supervisor’s tips based on the service they provide, without allowing a manager or supervisor to keep “any portion” of another employee’s tips (which section 3(m)(2)(B) of the Act prohibits)?

The Department also seeks comments on whether it should adjust its tip pooling regulations at § 531.54(c)(3) and (d), to permit managers and supervisors to contribute tips to employer-mandated tip pooling or tip sharing arrangements, provided they do not receive any tips from other employees. As noted above, the preamble accompanying the 2020 Tip final rule interprets § 531.54(c)(3) and (d) to preclude managers and supervisors from *contributing*, as well as *receiving*, tips from mandatory tip pooling or sharing arrangements.<sup>16</sup> In the context of a restaurant employer, for example, this means that the employer may require servers to give a portion of their tips to the bussers, but is

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<sup>16</sup> The Department noted that allowing managers and supervisors to participate in tip pools for one purpose (contributing tips) and not for another (receiving tips) would create confusion among employers and employees, and could lead to situations where it would be difficult for employers to demonstrate compliance with the prohibition on employees sharing tips with managers and supervisors. 85 FR 86764.



prohibited from requiring a manager or supervisor who also waits tables to similarly contribute a portion of their tips to the bussers. In their comment regarding the NPRM for the 2020 Tip final rule, the National Restaurant Association suggested that the Department allow managers or supervisors who receive tips from customers to contribute tips to a mandatory tip pool that includes other non-managerial employees, as long as the manager or supervisor does not receive any monies from such a pool, stating that this outcome is consistent with section 3(m)(2)(B) and would be beneficial to tipped employees. Although the Department is not proposing specific regulatory changes to the references to managers or supervisors in § 531.54(c)(3) and (d) or revising its interpretation of these provisions at this time, the Department is seeking additional information on these provisions for possible consideration of changes in the final rule:

1. Should the Department consider allowing managers and supervisors who receive tips to contribute to, but not collect from, employer-mandated tip pooling or tip sharing arrangements? Specifically, should the Department allow employers to require managers and supervisors to contribute a portion of their tips to mandatory tip pooling or sharing arrangements but maintain the prohibition on managers and supervisors receiving any tips from such pooling or sharing arrangements?<sup>17</sup>
2. If the Department were to allow managers and supervisors to contribute a portion of their tips to employer-mandated tip pools or sharing arrangements but not allow them to receive tips from such pools or sharing arrangements, what are the benefits and challenges of such an approach?
3. Should the Department consider, instead, allowing managers and supervisors who receive tips to contribute to employer-mandated tip pooling or tip sharing arrangements, but receive out of the tip pool no more than what they contributed?

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<sup>17</sup> The 2020 Tip final rule determined that this is equivalent to allowing managers or supervisors to keep a portion of the tips received by other employees. *See* 85 FR 86756, 86764.

Would such an arrangement be feasible for employers to administer while fully ensuring managers and supervisors do not keep other employees' tips?

#### **V. Questions about Recordkeeping Requirements for Enforcing Section 3(m)(2)(B)**

Section 11 of the FLSA gives the Department the authority to “prescribe by regulation or order” recordkeeping requirements “as necessary or appropriate” to enforce the provisions of the FLSA. 29 U.S.C. 211(c). In the 2020 Tip final rule, the Department adopts new recordkeeping requirements at 29 CFR 516.28(b) that apply to employers who do not take a tip credit, but still collect employees' tips to operate a mandatory tip pool. Section 516.28(b) requires these employers to identify on their payroll records each employee who receives tips, including non-tipped employees who receive tips from a nontraditional tip pool, and to keep records of the weekly or monthly amount of tips received by each employee, as reported by the employee to the employer. These requirements are consistent with some of the requirements for tipped employees that apply to employers who take a tip credit, set forth in § 516.28(a). The new requirements address other changes made by the 2020 Tip final rule, consistent with the CAA, which permit employers who do not take a tip credit to include non-tipped employees in mandatory nontraditional tip pools. These requirements in § 516.28(b) will go into effect on April 30, 2021.<sup>18</sup>

The Department is not considering revising its recordkeeping requirements in this rulemaking. However, the Department is seeking information about whether the recordkeeping requirements in § 516.28 should be revised in a subsequent rulemaking to better facilitate the enforcement of section 3(m)(2)(B), which creates a new cause of action when employers “keep” tips, regardless of whether or not the employer takes a tip

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<sup>18</sup> These requirements were scheduled to go into effect on March 1, 2021, but on February 26, 2021, the Department delayed the 2020 Tip final rule's effective date until April 30, 2021, to give the Department additional time to consider issues of law, policy, and fact that warranted additional review. *See* 86 FR 11632.

credit. Based on its enforcement experience, the Department is concerned that because the new regulations do not require that employers account for all tips that are contributed to a mandatory tip pool or tip sharing arrangement, it may be difficult for employees and for the Department to know if the employer is keeping tips. This may be of particular concern when the employer collects and distributes the tips in such an arrangement. As one commenter noted in response to the notice of proposed rulemaking on the delay of the 2020 Tip final rule “because many tips are not provided in cash, unscrupulous employers have an opportunity to misappropriate a portion of their workers’ income; and few employers maintain accurate and complete tip records. . . .” *See* NELP.

Specifically, the Department seeks comments on the following issues, with regard to employer-mandated tip pooling or tip sharing arrangements:

1. What records are necessary or appropriate to enforce the new prohibition on employers “keeping” tips, particularly when employers mandate tip pooling or tip sharing arrangements?
  - a. Should the Department require employers to keep a record of the total contributions to an employer-mandated tip pooling or tip sharing arrangement, in order to ensure that employers are not keeping tips and that all tips are distributed to employees?
  - b. Should the Department require employers to keep track of the total amount in tips that each employee receives from an employer-mandated tip pooling or tip sharing arrangement, in order to ensure that employers are not keeping tips and that all tips are distributed to employees?
2. How could the Department best structure a recordkeeping requirement to ensure that employers are not keeping tips and that all tips are distributed to employees, while placing the lowest burden possible on employers?

3. If the Department were to require employers to keep track of tips contributed to and/or received from an employer-mandated tip pool, how frequently should employers be required to record this information: each day, each workweek, each pay period or based on some other timeframe?
4. Whether the Department should require employers to provide employees with notice of the structure of any mandatory tip pooling or tip sharing arrangement (such as the frequency of distribution and the method for distribution/sharing of tips among employees)?
5. Whether record-keeping requirements, if any, should be different for employers who collect and distribute tips for an employer-mandated tip pool than for employers who mandate tip sharing arrangements but do not collect tips to distribute (e.g., an employer who requires a tipped employee to “tip out” another tipped or non-tipped employee).
6. Are there other ways that the Department can ensure that employees, and not employers, keep tips?

In addition to these specific questions, the Department also has more general questions about tip pooling that may be helpful to its future considerations of enforcement of the obligations of section 3(m)(2)(B):

1. What kind of employees typically participate in mandatory tip pooling arrangements and in what industries are these arrangements most common?
2. Are mandatory tip pooling or voluntary “tip out” arrangements more commonly used?

## **VI. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (PRA) and its attendant regulations require an agency to consider its need for any information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the

public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. The Department notes that the new recordkeeping burdens introduced by the 2020 Tip final rule were submitted to the Office of Management and Budget (OMB) as part of the NPRM published in the Federal Register October 8, 2019 (84 FR 53956) and again with the 2020 Tip final rule on December 30, 2020 (85 FR 86756). The OMB issued a notice of action approving the recordkeeping requirements and burdens associated with the 2020 Tip final rule on February 24, 2021. The recordkeeping provisions from that final rule are going into effect. This NPRM does not contain an additional collection of information subject to OMB approval under the PRA. The Department invites public comment on this determination.

## **VII. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review**

### *A. Introduction*

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.<sup>19</sup> Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as economically significant); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel

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<sup>19</sup> See 58 FR 51735, 51741 (Oct. 4, 1993).

legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. OIRA has determined that this proposed rule is not economically significant under section 3(f) of Executive Order 12866.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department anticipates may result from this proposed rule and was prepared pursuant to the above-mentioned Executive orders.

#### *B. Background*

In this NPRM, the Department proposes to withdraw and repropose the portion of the 2020 Tip final rule incorporating the CAA's new provisions authorizing the assessment of CMPs for violations of section 3(m)(2)(B) of the Act. The Department also proposes to withdraw and repropose additional portions of its CMP regulations addressing willful violations. Because these proposed changes would only apply when an employer violates the FLSA, the Department does not believe that they will have an impact on costs or transfers. The other provisions codifying the CAA amendments were already discussed and quantified in the 2020 Tip final rule, and so have not been quantified again here. The only costs quantified here are the rule familiarization costs associated with reviewing the proposed rule. The Department qualitatively discusses possible benefits associated with this proposed rule. The Department welcomes any

comments and data on additional costs or possible benefits associated with this proposed rule.

*C. Costs*

*1. Rule Familiarization Costs*

Regulatory familiarization costs represent direct costs to businesses associated with reviewing the new regulation. It is not clear whether regulatory familiarization costs are a function of the number of establishments or the number of firms.<sup>20</sup> Presumably, the headquarters of a firm will conduct the regulatory review for businesses with multiple locations, and may also require these locations to familiarize themselves with the regulation at the establishment level. To avoid underestimating the costs of this proposed rule, the Department uses both the number of establishments and the number of firms to estimate a potential range for regulatory familiarization costs. The lower bound of the range is calculated assuming that one specialist per firm will review the rule, and the upper bound of the range assumes one specialist per establishment.

The most recent data on private sector entities at the time this NPRM was drafted are from the 2017 Statistics of U.S. Businesses (SUSB).<sup>21</sup> The Department limited this analysis to a few industries that were acknowledged to have tipped workers in the 2020 Tip final rule. These industries are classified under the North American Industry Classification System (NAICS) as 713210 (Casinos), 721110 (Hotels and Motels), 722410 (Drinking Places (Alcoholic Beverages)), 722511 (Full-service Restaurants), 722513 (Limited Service Restaurants), and 722515 (Snack and Nonalcoholic Beverage Bars). The Department understands that there may be entities in other industries with

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<sup>20</sup> An establishment is a single economic unit that produces goods or services. Establishments are typically at one physical location and engaged in one, or predominantly one, type of economic activity. An establishment is in contrast to a firm, or a company, which is a business and may consist of one or more establishments.

<sup>21</sup> Statistics of U.S. Businesses 2017, <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>, 2017 SUSB Annual Data Tables by Establishment Industry.

tipped workers who may review this rule, and welcomes data and information on other industries that should be included in this analysis. See Table 1 for a list of the number of firms and establishments in each of these industries.

Table 1. Firms and Establishments in Tipped Industries

| Industry   | Firms   | Establishments |
|--|---------|----------------|
| NAICS 713210 (Casinos)                               | 221     | 292            |
| NAICS 721110 (Hotels and Motels)                     | 42,795  | 53,869         |
| NAICS 722410 (Drinking Places (Alcoholic Beverages)) | 39,323  | 40,156         |
| NAICS 722511 (Full-Service Restaurants)              | 217,111 | 250,871        |
| NAICS 722513 (Limited Service Restaurants)           | 157,353 | 251,000        |
| NAICS 722515 (Snack and Nonalcoholic Beverage Bars)  | 47,112  | 65,010         |
| Total  | 503,915 | 661,198        |

Source: Statistics of U.S. Businesses 2017

The Department believes 15 minutes per entity, on average, to be an appropriate review time for this proposed rule, because most of the information related to the CAA amendments that employers would have to familiarize themselves with was already captured in the 2020 Tip final rule. The changes in this proposed rule are small, and some are consistent with the Department's existing enforcement. This review time represents an average of employers who will spend less than 15 minutes reviewing, and others who will spend more time.

The Department's analysis assumes that the proposed rescission would be reviewed by Compensation, Benefits, and Job Analysis Specialists (SOC 13-1141) or employees of similar status and comparable pay. The median hourly wage for these workers was \$31.04 per hour in 2019, the most recent year of data available.<sup>22</sup> The Department also assumes that benefits are paid at a rate of 46 percent<sup>23</sup> and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully loaded hourly rate of \$50.60.

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<sup>22</sup> Occupational Employment and Wages, May 2019, <https://www.bls.gov/oes/current/oes131141.htm>.

<sup>23</sup> The benefits-earnings ratio is derived from the Bureau of Labor Statistics' Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.



The Department estimates that the lower bound of regulatory familiarization cost range would be \$6,374,525 (503,915 firms  $\times$  \$50.60  $\times$  0.25 hours), and the upper bound, \$8,364,155 (661,198 establishments  $\times$  \$50.60  $\times$  0.25 hours). The Department estimates that all regulatory familiarization costs would occur in Year 1.

Additionally, the Department estimated average annualized costs of this proposed rescission over 10 years. Over 10 years, it would have an average annual cost of \$0.8 million to \$1.1 million, calculated at a 7 percent discount rate (\$0.7 million to \$0.9 million calculated at a 3 percent discount rate). All costs are in 2019 dollars.

#### *D. Benefits*

This NPRM proposes to revise portions of the Department's CMP regulations regarding when a violation of section 6 (minimum wage) or section 7 (overtime) of the FLSA is "willful," and thus subject to a CMP under section 16(e). As discussed above, these portions of the Department's regulations are based on *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), which held that a violation is willful if the employer "knew or showed reckless disregard." This NPRM proposes to modify the CMP regulations to clarify that multiple circumstances can be sufficient to show a knowing violation of section 6 or 7. The Department also proposes to reinsert language in the CMP regulations to address the meaning of reckless disregard. The Department believes that these proposed revisions will better align its CMP regulations with how it actually litigates willfulness and make clearer to the regulated community when a violation is knowing or in reckless disregard and thus willful. This increased clarity will enable employers to better understand when they may be subject to a CMP for violating the FLSA's minimum wage or overtime requirements, which may enhance the penalty's deterrent effect.

This NPRM also proposes to replace regulatory language in its CMP regulations so that the Department is not limited in its assessment of tip CMPs to only repeated and

willful violations of section 3(m)(2)(B). This change is consistent with the text of section 16(e) of the FLSA, which provides that “[a]ny person who violates section 3(m)(2)(B) shall be subject to a civil penalty ... for each such violation, as the Secretary determines appropriate.” 29 U.S.C. 216(e). The Department believes that this change, by ensuring that the Department has the ability to impose CMPs for violations of section 3(m)(2)(B) when it deems appropriate, can help improve the enforcement of the statute, potentially discourage more employers from violating the FLSA, and better ensure that employees keep the tips they receive.

### **VIII. Regulatory Flexibility Act (RFA) Analysis**

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121 (1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Accordingly, the Department examined this proposed rule to determine whether it would have a significant economic impact on a substantial number of small entities. The most recent data on private sector entities at the time this NPRM was drafted are from the 2017 Statistics of U.S. Businesses (SUSB).<sup>24</sup> The Department limited this analysis to a few industries that were acknowledged to have tipped workers in the 2020 Tip final rule. These industries are classified under the North American Industry Classification System (NAICS) as 713210 (Casinos), 721110 (Hotels and Motels), 722410 (Drinking Places (Alcoholic Beverages)), 722511 (Full-service Restaurants), 722513 (Limited Service Restaurants), and 722515

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<sup>24</sup> Statistics of U.S. Businesses 2017, <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>, 2016 SUSB Annual Data Tables by Establishment Industry.

(Snack and Nonalcoholic Beverage Bars). The SUSB reports that these industries have 503,915 private firms and 661,198 private establishments. Of these, 501,322 firms and 554,088 establishments have fewer than 500 employees.

The per-entity cost for small business employers is the regulatory familiarization cost of \$12.65, or the fully loaded mean hourly wage of a Compensation, Benefits, and Job Analysis Specialist (\$50.60) multiplied by 1/4 hour (fifteen minutes). Because this cost is minimal for small business entities, and well below one percent of their gross annual revenues, which is typically at least \$100,000 per year for the smallest businesses, the Department certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. The Department welcomes any comments and data on this Regulatory Flexibility Act Analysis, including the costs and benefits of this proposed rule on small entities.

## **IX. Unfunded Mandates Reform Act of 1995**

The Unfunded Mandates Reform Act of 1995 (UMRA)<sup>25</sup> requires agencies to prepare a written statement for rules with a Federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of \$165 million (\$100 million in 1995 dollars adjusted for inflation) or more in at least one year.<sup>26</sup> This statement must: (1) identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative. This proposed rule is not expected to result in increased

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<sup>25</sup> See 2 U.S.C. 1501.

<sup>26</sup> Calculated using growth in the Gross Domestic Product deflator from 1995 to 2019. Bureau of Economic Analysis. Table 1.1.9. Implicit Price Deflators for Gross Domestic Product.

expenditures by the private sector or by state, local, and tribal governments of \$165 million or more in any one year.

#### **X. Executive Order 13132, Federalism**

The Department has (1) reviewed this proposed rescission in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

#### **XI. Executive Order 13175, Indian Tribal Governments**

This proposed rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

#### **List of Subjects**

##### **29 CFR Part 516**

Minimum wages, Reporting and recordkeeping requirements, Wages.

##### **29 CFR Part 531**

Wages.

##### **29 CFR Part 578**

Penalties, Wages.

##### **29 CFR Part 579**

Child labor, Penalties.

##### **29 CFR Part 580**

Administrative practice and procedure, Child labor, Penalties, Wages.

For the reasons set forth above, the Department proposes to amend title 29, parts 578, 579, and 580 of the Code of Federal Regulations as follows:

## **PART 578—TIP RETENTION, MINIMUM WAGE, AND OVERTIME**

### **VIOLATIONS—CIVIL MONEY PENALTIES**

1. The authority citation for part 578 is revised to read as follows:

AUTHORITY: 29 U.S.C. 216(e), as amended by sec. 9, Pub. L. 101-157, 103 Stat. 938, sec. 3103, Pub. L. 101-508, 104 Stat. 1388-29, sec. 302(a), Pub. L. 110-233, 122 Stat. 920, and sec. 1201, Div. S., Tit. XII, Pub. L. 115-141, 132 Stat. 348; Pub. L. 101-410, 104 Stat. 890 (28 U.S.C. 2461 note), as amended by sec. 31001(s), Pub. L. 104-134, 110 Stat. 1321-358, 1321-373, and sec. 701, Pub. L. 114-74, 129 Stat. 584.

2. The heading of part 578 is revised to read as set forth above.

3. Revise § 578.3 to read as follows:

#### **§ 578.3 What types of violations may result in a penalty being assessed?**

(a) *In general.* (1) A penalty of up to \$1,162 per violation may be assessed against any person who violates section 3(m)(2)(B) of the Act.

(2) A penalty of up to \$2,074 per violation may be assessed against any person who repeatedly or willfully violates section 6 (minimum wage) or section 7 (overtime) of the Act. The amount of the penalties stated in paragraphs (a)(1) and (2) of this section will be determined by applying the criteria in § 578.4.

(b) *Repeated violations.* An employer's violation of section 6 or section 7 of the Act shall be deemed to be "repeated" for purposes of this section:

(1) Where the employer has previously violated section 6 or section 7 of the Act, provided the employer has previously received notice, through a responsible official of the Wage and Hour Division or otherwise authoritatively, that the employer allegedly was in violation of the provisions of the Act; or

(2) Where a court or other tribunal has made a finding that an employer has previously violated section 6 or section 7 of the Act, unless an appeal therefrom which has been

timely filed is pending before a court or other tribunal with jurisdiction to hear the appeal, or unless the finding has been set aside or reversed by such appellate tribunal.

(c) *Willful violations.* (1) An employer's violation of section 6 or section 7 of the Act shall be deemed to be "willful" for purposes of this section where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful.

(2) For purposes of this section, the employer's receipt of advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful, among other situations, can be sufficient to show that the employer's conduct is knowing, but is not automatically dispositive.

(3) For purposes of this section, reckless disregard of the requirements of the Act means, among other situations, that the employer should have inquired further into whether its conduct was in compliance with the Act and failed to make adequate further inquiry.

4. Revise § 578.4(a) to read as follows:

**§ 578.4 Determination of penalty.**

(a) In determining the amount of penalty to be assessed for any violation of section 3(m)(2)(B) or repeated or willful violation of section 6 or section 7 of the Act, the Administrator shall consider the seriousness of the violations and the size of the employer's business.

\* \* \* \* \*

**PART 579—CHILD LABOR VIOLATIONS—CIVIL MONEY PENALTIES**

5. The authority citation for part 579 is revised to read as follows:

AUTHORITY: 29 U.S.C. 203(m), (l), 211, 212, 213(c), 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App; secs. 25, 29, Pub. L. 93-257, 88 Stat. 72, 76; Secretary of

Labor's Order No. 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 28 U.S.C.

2461 Note.

6. Amend § 579.1 by:

a. Redesignating paragraph (a)(2) as paragraph (a)(2)(i); and

b. Adding paragraph (a)(2)(ii).

The addition reads as follows:

**§ 579.1 Purpose and scope.**

(a)\*\*\*

(2)\*\*\*

(ii) Any person who violates section 203(m)(2)(B) of the FLSA, relating to the retention of tips, shall be subject to a civil penalty not to exceed \$1,162 for each such violation.

\* \* \* \* \*

7. Amend § 579.2 by revising the definition of “Willful violations” to read as follows:

**§ 579.2 Definitions.**

\* \* \* \* \*

*Willful violations* under this section has several components. An employer's violation of section 12 or section 13(c) of the Act relating to child labor or any regulation issued pursuant to such sections, shall be deemed to be willful for purposes of this section where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful. In addition, for purposes of this section, the employer's receipt of advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful, among other situations, can be sufficient to show that the employer's conduct is knowing, but is not automatically dispositive. For purposes of this

section, reckless disregard of the requirements of the Act means, among other situations, that the employer should have inquired further into whether its conduct was in compliance with the Act and failed to make adequate further inquiry.

## **PART 580—CIVIL MONEY PENALTIES—PROCEDURES FOR ASSESSING AND CONTESTING PENALTIES**

8. The authority citation for part 580 continues to read as follows:

AUTHORITY: 29 U.S.C. 9a, 203, 209, 211, 212, 213(c), 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App; secs. 25, 29, 88 Stat. 72, 76; Secretary's Order 01-2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 5 U.S.C. 500, 503, 551, 559; 103 Stat. 938.

9. Revise the first sentence of § 580.2 to read as follows:

### **§ 580.2 Applicability of procedures and rules.**

The procedures and rules contained in this part prescribe the administrative process for assessment of civil money penalties for any violation of the child labor provisions at section 12 of the Act and any regulation thereunder as set forth in part 579 of this chapter, and for assessment of civil money penalties for any violation of the tip retention provisions of section 3(m)(2)(B) or any repeated or willful violation of the minimum wage provisions of section 6 or the overtime provisions of section 7 of the Act or the regulations thereunder set forth in 29 CFR subtitle B, chapter V. \* \* \*

10. Revise the first sentence of § 580.3 to read as follows:

### **§ 580.3 Written notice of determination required.**

Whenever the Administrator determines that there has been a violation by any person of section 12 of the Act relating to child labor or any regulation thereunder as set forth in part 579 of this chapter, or determines that there has been a violation by any person of section 3(m)(2)(B), or determines that there has been a repeated or willful violation by any person of section 6 or section 7 of the Act, and determines that imposition of a civil



money penalty for such violation is appropriate, the Administrator shall issue and serve a notice of such penalty on such person in person or by certified mail. \* \* \*

11. Amend § 580.12 by revising the first sentence of paragraph (b) to read as follows:

**§ 580.12 Decision and Order of Administrative Law Judge.**

\* \* \* \* \*

(b) The decision of the Administrative Law Judge shall be limited to a determination of whether the respondent has committed a violation of section 12, a violation of section 3(m)(2)(B), or a repeated or willful violation of section 6 or section 7 of the Act, and the appropriateness of the penalty assessed by the Administrator. \* \* \*

\* \* \* \* \*

12. Amend § 580.18 by revising the third sentence in paragraph (b)(3) to read as follows:

**§ 580.18 Collection and recovery of penalty.**

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \* A willful violation of sections 6, 7, or 12 of the Act may subject the offender to the penalties provided in section 16(a) of the Act, enforced by the Department of Justice in criminal proceedings in the United States courts. \* \* \*

Signed this 22nd day of March, 2021.

Jessica Looman,

Principal Deputy Administrator, Wage and Hour Division.